UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMGLO KEMLITE LABORATORIES, INC.

and Case CA 13-CA-65271

BEATA OSSAK, An Individual

Cristina Ortega and Richard Kelliher-Paz, Esqs.
for the General Counsel.
Philip Miscimarra and Ross Friedman, Esqs.,
Morgan, Lewis & Bockius LLP, Chicago, Illinois,
for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois on January 30 – February 1, 2012. Beata Ossak filed the charge on September 23, 2011 and the General Counsel issued the complaint on December 30, 2011.

Virtually the entire production workforce of approximately 94 employees at Respondent's non-unionized Bensenville, Illinois facility went on strike at mid-morning on Tuesday, September 20, 2011.[1] On September 27, 2011, all or almost all of the employees had either returned to work or agreed to return to work with no change in their working conditions as compared to before the strike. By September 30, 72 or 73 of these employees had returned to work. Twenty-two were not recalled and were placed on a preferential hiring list.

The General Counsel alleges that Respondent violated Section 8(a)(1) by threatening employees, terminating them in retaliation for the strike and transferring work from the Bensenville facility to Respondent's Juarez, Mexico facility in retaliation for the strike.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[1] Respondent also has production facilities in Florida, Juarez, Mexico and China. I conclude that the best evidence as to the number of production employees at Bensenville as of September 20, 2011 is 94, Co. Exh. 6.

[2] Tr.253, line 8 & Tr. 255 line 22: 2428A should be 3428A.

FINDINGS OF FACT[3]

I. JURISDICTION

Respondent, a corporation, manufactures specialty lamps, such as those on airplane wings at its facility in Bensenville, Illinois. It annually sells and ships goods valued at excess of $50,000 from this facility directly to points outside of Illinois.. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Izabella Christian, Respondent's President and Chief Operating Officer travelled from Florida to Chicago on September 18. On Monday, a supervisor told Christian that employees wanted a wage increase. Several employees had complained to Christian and/or plant manager Anna Czajkowska before this visit to Chicago about the lack of any wage increases. Christian told the supervisor that employees' wages were frozen and that Respondent could not raise wage rates.

Tuesday, September 20, 2011

The next day, Tuesday, September 20, 2011, at about 8:40 a.m., virtually the entire workforce at Respondent's Bensenville, Illinois plant, including all 94 production employees, did not return to work after their morning break. Instead they gathered in the area in which Respondent's lamps are assembled.

Margaret Chlipala, Respondent's production transfer coordinator, called Christian and plant manager Anna Czajkowska and told them that the employees had not returned to work and were gathered in the assembly area. Christian and Czajkowska went directly to the assembly area upon arriving at the plant. They addressed the assembled employees in Polish. All or virtually all the employees speak and understand Polish; some do not speak and understand English.

Czajkowska, who was upset, asked the employees what they were doing and told them to return to work. An employee or several employees said they wanted to know about wage increases. Either Christian or Czajkowska told the employees that Respondent could not raise their wages. The meeting between the employees and Christian and Czajkowska lasted between

[3] I do not think there are any material differences between the testimony of current employees Katarzyna Dziekan and Beata Ossak and the testimony of management's witnesses. To the extent that there may be any differences, I find the testimony of Dziekan and Ossak to be completely credible. As current employees their testimony is particularly reliable in that it is adverse to their pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978); *Flexsteel Industries,* 316 NLRB 745 (1995).

45 minutes and 90 minutes.[4] Christian and/or Czajkowska stated several times during this meeting that raises were not possible and that employees should return to work.

One or more employees asked if they could speak to Jim Hyland, Respondent's owner and Chief Executive Officer. Christian responded negatively and said that Hyland was not as "pro-Polish" as he used to be. Czajkowska stated that Hyland would tell her and Christian to "get rid of half of you," Tr. 128.

Czajkowska had about ten copies of a resignation form, G.C. Exh. 5, in her hand. She told the employees something to the effect that if they did not like working for their current wage rate, they could resign, Tr. 175. Czajkowska may have told employees at some point during the meeting to leave the plant if they were not going to go back to work.[5] However, the discussion between Christian, Czajkowska and the striking employees continued. There was, for example, a discussion between Christian and employee Hanna Dulian about the impact of globalization and Respondent's foreign facilities on the Bensenville plant.

At one point employee Stanislawa Pietras, who worked in the Pyrex Department, indicated she wanted to go back to work. Employee Zofia Bialon told Pietras to be quiet. Czajkowska proffered Zofia Bialon a resignation form and encouraged her to sign the form and leave. Bialon told Czajkowska she should sign the form herself, Tr. 205-07, 36-37.

At about 10:30 a.m., Czajkowska and Christian left the assembly area. At that time they did not order employees to leave the facility if they were not going to return to work. Between 11:00 a.m. and 1:00 p.m., the employees prepared a petition in Polish, which human resource employee Marta Cooley took to Czajkowska and Christian, who were in the plant quality control room, G.C. Exh. 3. The petition, as translated in English, stated:

[4] The most credible evidence as to the duration of the meeting is the testimony of Beata Ossak (45 minutes to one hour, Tr. 131) and that of Izabella Christian, which indicates that she and Czajkowska arrived somewhere between 9 and 9:30 and left the meeting at about 10:30 a.m., Tr. 306-308.

[5] The record is somewhat unclear on this point. Katarzyna Dziekan testified that Czajkowska threw some resignation papers on a table and told employees to sign them or "pack up and go," Tr. 85. On cross-examination, Dziekan testified that at the beginning of the meeting Czajkowska told the employees that there would be no raises and "if anyone does not like it, they should punch out and go home," Tr. 105, Co. Exh. 3. Ossak also testified that Czajkowska said "go back to work or punch out," Tr. 158. However, it is clear that the discussion between employees and Czajkowska and Christian continued for some time afterwards.

Czajkowska and Christian deny that either of them ever ordered employees to get out of the plant, Tr. 199-201. Krystyna Skomorowska, a witness called by Respondent, did not hear Czajkowska or Christian say that the striking employees were fired or that they should "get out" or "punch out," G.C. Exh. 9, p. 2. Eva Kulikowski, another supervisor, did not hear either tell the employees to "get out." She was not sure whether or not they said anything about "punching out," Co. Exh. 15, p. 2. I do not credit the testimony of "Jesse" Kopec that Czajkowska and/or Christian told any employees that they were fired on September 20. There is no other testimony to this effect.

Strike

With regards of the conditions of ending the strike:

1) We request actual pay and pay back for every year since the last wage increase in a rate of the inflation rate according to the attachment.[6]

2) We request written guarantee to receive annual wage increase according to the federal annual inflation.

Czajkowska and Christian were aware that most of the employees were still waiting in the plant assembly area for a response to the petition at 1:15 pm. and even later. Neither responded to the petition nor ordered the employees to leave the plant. Upon receiving the petition Czajkowska and Christian went first to talk to Respondent's CFO Larry Kerchenfaut and then called Respondent's owner Jim Hyland in Florida to discuss the petition.

Also, at about 1:00 p.m., Czajkowska and Christian approached Krystyna Skomorowska, a working foreman, who either never joined the strikers or returned to work during or shortly after the employees met management. They asked Skomorowska to approach the other working foremen and have them come to meet Czajkowska and Christian in the quality control room. I infer this was an effort to enlist these foremen to assist in ending the strike. Skomorowska was unsuccessful and reported to Czajkowska and Christian that employees were planning to return the next morning.

All or virtually the employees remained in the assembly area until 2:45 p.m.. Many thus stayed in the plant beyond the end of their shift at 1:15. A small group of employees who were on a late afternoon or evening shift worked on September 20. Their work was unaffected by the strike.[7]

That evening Respondent changed the locks on the gates to the facility and contacted the Bensenville police department. The next morning, Wednesday, September 21, many employees arrived around 5:00 a.m. and were unable to enter the plant.[8] This was the starting time for many of these employees. At about 7:00 a.m. Christian, Czajkowska, Larry Kerchenfaut, Respondent's Chief Financial Officer and a company director, came to the employee entrance to the plant with a Bensenville policeman. First they asked the employees to return to work. An employee or employees responded that they would not do so without a raise. Kerchenfaut, Czajkowska and the policeman then told the employees that they must get off Respondent's

[6] A chart with inflation rates between 2000 and 2011 was attached. This translation herein is a synthesis of an on-the-record exchange between witness Beata Ossak and Respondent's COO Izabella Christian, at Tr. 136-39.

[7] I do not credit the testimony of Respondent's witnesses Christian and Skomorowska at Tr. 309 and 370-71 that Skomorowska advised Christian on September 20, that the employees planned to continue their in plant work stoppage on Wednesday, September 21. This is completely inconsistent with Christian's account of her conversation with "Jesse" Kopec several hours later in which she testified she told Kopec to come back the next morning, Tr. 310-11. The testimony of Dziekan and Ossak indicates, however, that the employees expected a response to their written petition.

[8] Some employees began their shifts at 5:00; others at 6:30.

property. The employees complied with this order. They moved their cars from Respondent's parking lot to a public street and reassembled on public property across from the plant. Sometime prior to this, Czajkowska and employee Elizabeta Rosa[9] had a verbal exchange in Polish. Czajkowska asked the employees what they were doing at the plant. She may have told them that they were fired. Rosa replied, "so you did fire us." Czajkowska replied, "No, you fired yourselves when you walked off the job," Tr. 183.

Christian and Czajkowska tried to contact some employees through their supervisors as early as the afternoon or evening of September 20. These supervisors had difficulty contacting employees because maintenance foreman "Jesse" Kopec had advised employees not to answer the telephone, so that they would not be pressured into returning to work without a raise, Tr. 382, 386-87.

Ten employees returned to work on September 21 and 17 employees returned to work on Thursday, September 22. Only one, a hearing impaired employee whose mother was contacted, went back to work on September 23. Two more returned to work on Monday, September 26. However, the majority of Respondent's employees gathered in front of the plant on Thursday, September 22, Friday, September 23, and Monday, September 26, and did not return to work.

On Friday, September 23, 7-8 employees asked for permission to return to work. Czajkowska told them that they would have to fill out employment applications. However, there is no evidence that any employee did so. On Monday, September 26, four replacement employees began working at Respondent's facility. Two quit after the first day and two were still working at the plant at the end of January 2012.

On Tuesday, September 27, fifty-seven employees signed a document attesting to the fact that they were willing to return to work under the same wages and working conditions that existed when they went on strike, G.C. Exh. 2. The document also stated that the employees understood that there would be no raises and that Respondent had no plans to increase wages in the near future.

As of September 30, 72 or 73 employees had returned to work; the other 22 were placed on a preferential hiring list. As of February 1, 2012, none of the employees on the preferential hiring list had been recalled.

Analysis

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other*

[9] The transcript records this employee's name as Tarosa, Tr. 218. There is no such person who worked for Respondent in September 2011. In infer that whoever transcribed this hearing mistook the "ta" at the end of the employee's first name, for the first two letters of her second name, see G.C. Exh. 4, page 2.

concerted activities for the purpose of collective bargaining or other mutual aid or protection ... (Emphasis added)"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

In order to establish that an employee or employees were discharged in violation of Section 8(a)(3) and/or Section 8(a)(1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst. Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The General Counsel's initial showing usually requires him to prove that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. The National Labor Relations Board may infer discriminatory motive from the record as a whole and under certain circumstances, indeed not uncommonly, infers discrimination in the absence of direct evidence.

Respondent's employees engaged in protected concerted activity by refusing to work to protest Respondent's unwillingness to raise their salaries.

In *Quietflex Mfg. Co.,* 344 NLRB 1055 (2005), the Board cited 10 factors to weigh in determining whether an in-plant work stoppage is protected. No one factor is controlling. These factors as applied to this case are as follows:

(1) The reason the employees have stopped working: In this case the work stoppage was due to the fact that Respondent had not raised employees' wages for what appears to have been a period of six years. Unlike the employees in *Waco, Inc.,* 273 NLRB 746 (1984), Respondent's employees communicated the particulars of their grievance and how they wished it to be resolved. They remained in the assembly waiting for a definitive response to this grievance.

(2) The work stoppage was completely peaceful. One employee told one other employee to be quiet when she expressed a desire to go back to work. Krystyna Skomorowska, a working "supervisor," testified that she wanted to return to work but was afraid to do so. Other testimony cited by Respondent as evidence that some employees were afraid to return to work is hearsay and not credible. It is not clear that any employee was afraid of anything other than social ostracization in their closely knit community.

(3) The work stoppage did not interfere with Respondent's production to any greater extent than a strike outside of the plant. First of all, the entire workforce took part in the strike, thus the fact that employees stopped work inside the plant affected production no more than if they had walked out and assembled off of Respondent's property. The strikers did not prevent other employees from working by gathering in the assembly area, as opposed to gathering outside the plant. Respondent made no attempt to obtain replacement workers until Thursday or Friday, when the strikers were locked out.

Secondly, the work stoppage did not deprive Respondent of access to its property other than the assembly area. Since there is no indication that any employees who worked in the assembly area attempted or desired to return to work on September 20, the fact that employees remained in the assembly area until 2:45 had no greater impact on Respondent's business than if the employees had walked out of the plant. On September 21, 10 employees returned to work, none of whom worked in the assembly department, Co. Exh. 5.

(4) The employees had an opportunity to present their grievances. However, it was not until they presented their petition to management that they were able to specify their demands. They never received any response to this petition until they were locked out of the facility the next morning. I credit the testimony of Dziekan and Ossak that at least some employees expected a response to their written petition.

(5) Employees were never given any warning that they must leave the premises or face discharge. In this regard, I credit Anna Czajkowska that at no time on September 20 did she tell employees that they were fired or to "get out." Christian and Czajkowska did tell employees to return to work several times and may have suggested that some or all resign, but they proceeded to engage in a lengthy discussion with employees afterwards, possibly leaving some or all the employees with the hope that their grievance regarding wage increases might be addressed more satisfactorily.

(6) The duration of the work stoppage is the only factor set forth in *Quietflex* that supports a conclusion that the employees' work stoppage was unprotected. I conclude that it is outweighed by the other nine factors. However, the fact that employees remained in the plant so long was due in part to the ambiguity of Respondent's responses to the employee demands. On September 21, Respondent clarified this ambiguity by letting employees know that they could continue working for Respondent only if they agreed to work under unchanged conditions.

(7) Respondent's employees were unrepresented and as far as this record shows Respondent did not have a grievance procedure. Thus, the in-plant work stoppage was one of the few, if only, ways of communicating their grievance to Respondent. Individual employees had complained to Respondent about the lack of wage increases prior to September 20, to no avail. As Justice Black noted in *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962), employees without a representative of any kind, may under certain circumstances have to speak for themselves as best they can. In this case, the employees in unison decided that the only way to present their grievances regarding their wages was to withhold their labor inside the plant and force management to address this issue.

(8) At least some employees remained in the assembly area for as much as 90 minutes after their work shift ended. However, they did not interfere with production to any extent beyond withholding their labor. There is no indication that the work stoppage interfered with the work of the few employees who worked at the plant on September 20, after 2:45 p.m..

(9) Respondent's employees made no attempt to seize Respondent's property other than by gathering in the assembly area. This case is thus distinguishable from *Peck, Incorporated,* 226 NLRB 1174 (1976) which is cited in the *Quickflex* decision. The employees in *Peck* prevented the employer from closing the plant and remained there after a supervisor told them they would be terminated if they did not leave.

(10) Respondent contends that it did not discharge any of the employees. It argues that it laid-off 22 of the production employees for non-discriminatory economic reasons. The fact that Respondent did not discharge any employees for remaining in the assembly area until 2:45 weighs in favor of finding their conduct protected, *Molon Motor & Coil Corp.* 301 NLRB 138 (1991), enfd. 965 F. 2d 523, 528 (7th Cir. 1992). This also distinguishes this case from *Cambro Mfg. Co,* 312 NLRB 634 (1993) in which the employees were terminated for their refusal to leave company property.[10]

Respondent's knowledge of and animus towards employees' protected activity

Respondent knew of the strike since Izabella Christian and Anna Czajkowska met with the employees on September 20 and 21. Respondent's animus is established, among other things, by its decision to lock out its employees on September 21 and the statements made by Czajkowska to striking employees.

Discriminatory Motive

The General Counsel's initial showing of discriminatory motivation is established by the fact that Respondent did not have any plans to lay-off or terminate employees from the Bensenville plant prior to the September strike.[11] Izabella Christian stated in an affidavit given to the Board Agent investigating this case that, "at the time of the work stoppage, management reviewed our production needs to see how many employees we really needed," Tr. 320.[12] This admission, that the timing of the lay-off was a result of the strike, meets the General Counsel's initial burden of proof. Indeed, regardless of whether Respondent had plans to lay-off employees at a later date, the acceleration of the lay-off establishes a violation of the Act, *Eddyleon Chocolate Co.,* 301 NLRB 887, 889-891 (1991).

[10] *Cambro* is also distinguishable in that prior to the employees' refusal to leave the employer's facility, the employer had agreed to meet with the employees the following day to discuss their grievances.

[11] Respondent last had a lay-off in April or May 2009, apparently a result of a big drop in revenue as the result of the 2008-09 recession.

[12] I do not credit Isabella Christian's testimony at Tr. 302 that just before her trip to Chicago, she and Jim Hyland discussed the need to lay-off employees at Bensenville at some unspecified time in the future. There is no documentary corroboration for such a plan and Christian did not share this plan with anyone at Bensenville, including Czajkowska, see e.g., Tr. 305-06.

While no charge was filed alleging an unlawfully accelerated lay-off and the General Counsel did not argue this case on such a theory, the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and the violation has been fully litigated, *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F. 2d 130 (2d Cir. 1990). Here a close connection exists between the complaint allegation that the employees were terminated in retaliation for their concerted strike and the question of whether the Respondent laid them off or accelerated a lay-off in retaliation for the strike. Moreover, as in *Pergament,* Respondent's management herein admitted that it accelerated the layoff because of the strike. Respondent also fully litigated its reasons for having a lay-off. Thus, *Pergament* compels a finding that Respondent unlawfully accelerated the lay-offs of 22 employees no later than September 30, 2011, *Service Employees Intern. Union, Local 32BJ v. N.L.R.B.,* 647 F.3d 435 (2d Cir. 2011).

Respondent's affirmative defense

Thus the burden of proof has shifted to Respondent to prove that the lay-off of the employees who were not recalled was not discriminatorily motivated. I credit the testimony of Respondent's witnesses that it did not fire any employees.

Respondent has failed to meet its burden of proof. First of all, Respondent has admitted that the timing of the lay-off is related to the strike. Moreover, the evidence on which it relies for its contention that it was planning a lay-off for non-discriminatory economic reasons is unconvincing. I do not credit the testimony of Respondent's management that there were discussions about lay-offs or an intention to lay-off employees at Bensenville prior to the strike. Respondent presented no evidence to support this contention other than self-serving testimony.

Respondent also relies on the testimony of Grant Hyland, its Vice-President for sales and marketing, as well as R. Exhs. 6 and 7, which indicate the number of lamps produced, the number of production employees, the number of production overtime hours and revenues.

Hyland attempted to paint a very bleak picture regarding the future of the Bensenville plant. However, in many respects Respondent's exhibits do not support that testimony. Respondent's revenues were relatively low in September 2011 ($660,192). However, most of its production employees were on strike for a week or more during this month. For that reason, the revenue figures for September are not indicative of anything relevant to this case. The revenues for December 2011 and estimated revenue for January 2012 are also relatively low, below $700,000.

Nevertheless, there are statistics that belie Respondent's claim that it laid off 22 employees for nondiscriminatory reasons. The revenue figure for October 2011, $758,445 is greater than that for November and December 2010 and the number of production overtime hours is almost three times that for October 2010, when Respondent had 85 production employees as opposed to 72 in October 2011. The revenue figure for November 2011, $835,186 is greater than that for October, November and December 2010 and June and July of 2011. In June and July 2011 Respondent had 93 production employees who worked slightly less overtime than did the 72 in November 2011.

One is also struck by the fact that revenue for August 2011, the month before the strike was $920,064, the most since September 2010 and the number of overtime hours worked, 1594, is the greatest number during the same period. As the General Counsel points out, Respondent increased the production workforce from 85 to 94 between December 2010 and August 2011, a fact which is also inconsistent with the bleak picture painted by Hyland, Co. Exh. 6. There is no credible nondiscriminatory explanation as to why the future of the Bensenville plant suddenly became so dim after the strike.[13]

Respondent concedes that its exhibits regarding the number of employees and the number of overtime hours for production employees at its Juarez, Mexico facility may not be accurate, Tr. 237-38. Thus, I find that Respondent has not established that it did not transfer a significant amount of production work to Juarez and/or other facilities in retaliation for the strike at Bensenville. This is particularly true in light of Anna Czajkowska's statement to the Board Agent during Region 13's investigation that, "the company accelerated its decision to transfer the work to Mexico because of the strike," Tr. 285.

Izabella Christian, in her affidavit to the Board stated, "the reason for this transfer of work was because the employees had walked out in September and they said they were not coming back, and also because Mexico has the capacity to build these same products," Tr. 316-17. At hearing Respondent attempted to show that there was very little work permanently transferred to the Juarez plant. I am not persuaded that this is true in the absence of accurate statistics regarding the Juarez, Chinese and Florida facilities.

Hyland cited concerns about economic conditions in Europe and technological advances in LED lighting as reasons for his bleak projections for the future. There is no credible evidence linking these concerns to the timing of the lay-off of the 22 employees.

The General Counsel has not alleged that Respondent discriminated in selecting employees for lay-off. However, Respondent's decision not to recall certain employees also strongly suggests discriminatory motive. Respondent has offered no explanation as to how it chose the employees it recalled and those it did not. The record herein strongly suggests discriminatory motive with respect to some of these decisions. Of the two maintenance men, Respondent recalled the most junior, Stanislaw Wilusz, who had called Christian and Czajkowska on Wednesday to tell them that he had worked all day on Tuesday, September 20.

[13] Respondent has failed to draw a convincing relationship between the number of lamps shipped and its need for production employees. First of all, it would have to show that all its lamps require the same number of production employees. It may well be that some products are more labor intensive than others. I would also note that the number of lamps shipped from Bensenville during 2010 and 2011 was highest in May 2011, which is inconsistent with Grant Hyland's testimony as to an increasingly deteriorating economic climate for Respondent's plant. The number of lamps shipped in August 2011 was greater than the number shipped in August 2010. The number of overtime hours needed to produce Respondent's lamps was significantly higher from March 2011 through August 2011, compared with 2010, despite the fact that Respondent had more production employees.

Moreover, I infer that Respondent knew that the senior maintenance man, "Jesse" Kopec had been encouraging employees to continue the strike.[14]

Respondent also did not recall Elizabeta Rosa, the employee who had the verbal confrontation with Czajkowska on September 20. Rosa was not the most junior employee in the Pyrex department, G.C. Exh. 4, p. 2. There is no explanation in this record as to why she was not recalled when more junior employees were recalled. Similarly Zofia Bialon, the employee who told Stanislawa Pietras to be quiet in front of management on September 20 was not recalled. She was also not the most junior employee in her department, G.C. Exh. 4, p. 3. Dorota Cholewiak, a much junior employee with the same job description was recalled to work.

Several other employees who were not recalled also stood out as to their involvement in the work stoppage. Sebastian Kepa was among the employees who approached Czajkowska on September 23. Alicja Probola and Bernadetta Cukier were among the four who went to the NLRB Regional Office the same day. Hanna Dulian, who spoke up at the meeting with management on September 20, was also not recalled. Dziekan and Pavlo Dovhaychuk, who approached Czajkowska with Kepa, were among the last six employees who were recalled on September 30, as was Ossak. Co. Exh. 6.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid-off twenty-two employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of layoff to the date of proper offer of reinstatement, less any

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[14] Respondent has not met its burden of proving that Kopec or any of the other alleged discriminatees was a "supervisor" within the meaning of Section 2(11) of the Act.

Section 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." An individual who is a "supervisor" pursuant to Section 2(11) is excluded from the definition of "employee" in Section 2(3) of the Act and therefore does not have the rights accorded to employees by Section 7 of the Act.

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor.

Respondent has not established that Kopec was required to use independent judgment for matters other than those which were routine in directing Respondent's other maintenance employee, Stanislaw Wilusz. Kopec did not assign Wilusz his place of work or his hours. As to his "responsibility to direct" Wilusz, Respondent did not establish that Kopec was held accountable for Wilusz's job performance, *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006).

net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center,* 356 NLRB No. 8 (October 22, 2010) enfd. denied on other grounds sub nom., Jackson Hospital Corp. v. NLRB, 647 F.3d 1137 (D.C. Cir. 2011), as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

However, backpay shall be tolled for any period after September 20, 2011 for which the Respondent proves at compliance that it would have laid off these individuals for legitimate nondiscriminatory economic reasons.

Respondent shall reimburse each of these employees in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits their backpay to the proper quarters on their Social Security earnings record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Amglo Kemlite Laboratories, Inc., Bensenville, Illinois its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying-off or otherwise discriminating against any employee for engaging in concerted activity for the mutual aid and protection of employees;

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer each employee who went on strike on September 20, 2011 and was not recalled to work by September 30, 2011, full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make each employee who went on strike on September 20, 2011 and was not recalled to work by September 30, 2011, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as specified in the remedy portion of this decision.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful lay-off of these employees and within 3 days thereafter notify them in writing that this has been done and that their lay-off will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Bensenville, Illinois facility copies of the attached notice marked "Appendix."[16] in both English and Polish. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2011. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 22, 2012.

_____
Arthur J. Amchan
Administrative Law Judge

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge, lay-off or otherwise discriminate against any of you for engaging in concerted activity for your mutual aid and protection, such as a strike for higher wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to those employees who went on strike on September 20, 2011 and have not been recalled to work, to their job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make those employees who went on strike on September 20, 2011 and were not recalled to work by September 30, 2011, whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful lay-off of those employees who went on strike on September 20, 2011 and were not recalled to work by September 30, 2011 and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the lay-off will not be used against her in any way.

AMGLO KEMLITE LABORATORIES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-5208
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.